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August 9, 2004

**AGENDA ITEM**  
For Meeting of: 8-12-04  
**SUBMITTED LATE**

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*  
Staff Director

FROM: Lawrence H. Norton *LHN*  
General Counsel

Rosemary C. Smith *RC5*  
Associate General Counsel

Mai T. Dinh *MTD*  
Assistant General Counsel

Michael Marinelli *MM*  
Staff Attorney *by MTD*

Subject: Draft AO 2004-23

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 12, 2004.

Attachment

1 ADVISORY OPINION 2004-23

2  
3 Thomas J. Spulak  
4 ShawPittman, LLP  
5 2300 N Street, N.W.  
6 Washington, D.C. 20037-1128  
7

**DRAFT**

8  
9 Dear Mr. Spulak:

10  
11 This responds to your letter dated June 8, 2004, as supplemented by subsequent  
12 electronic mail messages, which requests an advisory opinion concerning the application  
13 of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission  
14 regulations to proposed solicitations of contributions by U.S. Oncology, Inc. Good  
15 Government Committee ("USON-GGC"), a separate segregated fund ("SSF") of U.S.  
16 Oncology Inc. ("USON"). These solicitations would be directed to USON's stockholders  
17 and their families and the medical executive and administrative personnel of the  
18 physician practices (the "Practices") managed by USON, including the physicians, nurses  
19 and other salaried employees who have policymaking, managerial, professional, or  
20 supervisory responsibility, and their families.<sup>1</sup>

21 ***Background***

22 *1. Description of USON enterprise*

23 USON contracts with cancer care physician practices nationwide. It provides  
24 comprehensive business management services including services relating to medical  
25 oncology management, outpatient cancer center operations, and cancer research and  
26 development to a network of more than 865 physicians across 27 states.

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<sup>1</sup> You state that currently none of the Practices maintain their own SSF.

1           You explain that USON creates subsidiaries that enter into exclusive long-term  
2 management services agreements (“MSAs”) with affiliated Practices, generally with  
3 initial terms of 25-40 years. Under the MSAs, USON, through its subsidiaries, manages  
4 the business aspects of the Practices including providing USON employees who engage  
5 in billing, collection, personnel services, general management and administrative office  
6 services. As consideration for its services, USON is reimbursed for costs incurred in  
7 providing management services and receives a service fee from the Practices, which is  
8 generally either a percentage of earnings before income taxes or a fixed fee plus a  
9 percentage fee, subject to certain adjustments. In some cases, USON receives a fixed fee.  
10 As part of the request, you have included an example of one such MSA, as well as a  
11 sample physician employment agreement (“physician agreement”) setting out the terms of  
12 employment between a Practice and a member physician.

13           Under the MSA, the USON subsidiary is referred to as the “Business Manager.”  
14 See MSA section 1.6. You explain that the Practice Administrator is the individual who  
15 is in charge of the Business Manager’s affairs at the local level.

16       2.     *USON and Practice decision-making*

17           Under the MSA, the Business Manager provides the Practice with office space,  
18 equipment, furnishings, and supplies and furnishes administrative staff necessary for the  
19 Practice to operate. When USON enters into a relationship with a new physician practice,  
20 it generally purchases these assets from that Practice and often hires the existing  
21 administrative staff of the Practice.

22           The Business Manager and the Practice jointly make certain decisions regarding  
23 management of the non-medical aspects of the Practice through a “Policy Board” that is

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20 it generally purchases these assets from that Practice and often hires the existing  
21 administrative staff of the Practice.

22           The Business Manager and the Practice jointly make certain decisions regarding  
23 management of the non-medical aspects of the Practice through a “Policy Board” that is

1 established under the MSA. The Policy Board is responsible for developing and  
2 implementing management and administrative policies for the overall operation of the  
3 non-medical aspects of the Practice. The Business Manager and the Practice each  
4 designate members to the Policy Board. Each of those designees has the authority to  
5 represent its respective party on all matters before the Policy Board. Regardless of the  
6 number of representatives on the Policy Board, the Practice representatives collectively  
7 cast one vote and the USON representatives collectively cast one vote, so that the  
8 Business Manager and the Practice each has equal input into Policy Board decisions. A  
9 deadlock results in no action being taken.

10       You affirm that USON does not, however, in any way control, direct or influence  
11 the practice of medicine by the affiliated Practices.<sup>2</sup> In addition, because USON does not  
12 have any ownership interest in the Practices, the Business Managers do not have the  
13 power to designate the Practices' board of directors or officers.

14       The Practice may only provide medical services under the USON arrangement and  
15 the Business Manager agrees to provide management services only to its managed  
16 Practice within a specified geographical area. Practice physicians generally are bound by  
17 non-competition covenants whereby they agree not to compete with their Practice in the  
18 practice of medicine and agree not to compete with USON in the business of managing  
19 medical practices.

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<sup>2</sup> Despite the broad list of topics subject to the Policy Board's jurisdiction, the physician representatives of the Practice alone make decisions in certain areas. These areas are: the types and levels of medical services to be provided; the recruitment of physicians to the Practice; the acquisition of, or merger with, any other medical Practice in the practice area; fee schedules, marketing and advertising of the services performed at the Practice facilities; and "any other function or decision that the parties agree is medical related." *See* MSA section 3.3.

1     3.     *USON and Practice personnel issues*

2             As noted above, the Business Manager provides all of the non-medical staff and  
3     equipment and supplies necessary for the Practice to operate. In many cases, personnel of  
4     the Practice are hired by USON when it first enters into an MSA with the Practice. The  
5     Business manager also administers the compensation and benefits of the Practice's  
6     medical personnel. USON and the Practices share a USON-administered benefits  
7     package (including healthcare insurance), which is utilized by the Practices and USON  
8     employees.

9             You explain that Regional Vice Presidents, Executive Directors and Practice  
10    Administrators are USON employees (selected in coordination with the Practices) and  
11    play key decision-making roles regarding the manner in which USON provides  
12    administrative services to the Practices. The Practice Administrator is the senior on-site  
13    decision-maker for all non-clinical administrative activities of USON under the MSA.  
14    While the Practice Administrator has an advisory role regarding administration of clinical  
15    staff, the clinical manager, such as the nurse manager, makes the final decisions on the  
16    hiring, firing, evaluation and promotion of clinical staff. Under the MSA, the Business  
17    Manager can assist with assessment of the financial impact of personnel decisions as well  
18    as other non-clinical factors. The Business Manager also provides comprehensive  
19    recruiting services, including market intelligence regarding compensation and related  
20    issues that would inform a Practice's decision regarding hiring.

21            You state that on a nationwide level, USON also conducts meetings and activities  
22    of a national policy board ("NPB"), which includes at least one physician from each  
23    Practice, as well as representatives from USON. NPB members serve in an advisory

1 capacity and make recommendations to the Practices. Each Practice decides whether to  
2 adopt or reject these recommendations with non-medical recommendations subject to the  
3 approval by the respective Policy Boards. While the NPB has no binding authority, it  
4 does facilitate communication between USON and the Practices, and allows physicians to  
5 participate and take advantage of the breadth and scope of USON's network of managed  
6 Practices. In addition, if USON wishes to propose an initiative on a national level, it can  
7 do so through the NPB to avoid having to replicate its discussion with every Practice.  
8 The NPB also includes committees in areas such as research and radiation that serve to  
9 provide feedback and advice to USON management regarding the development of the  
10 business aspects of these areas.

11 At present, two of the ten members of USON's board of directors are Practice  
12 physicians.

13 4. *USON and financial support and provisioning of goods and services*

14 You explain that USON (through its subsidiaries), on an ongoing basis, pays all  
15 office expenses and provides significant financing for a Practice's medical equipment and  
16 other capital needs. For example, USON provides funds, goods and services for such  
17 purposes as: information technology; operation and capital investment for communication  
18 support, database management, research and accounting; staff training; front office and  
19 pharmacy personnel; legislative and regulatory compliance, audit and advocacy services;  
20 a clinical research organization and related activities; and consulting and marketing. The  
21 Practices reimburse USON for these funds, goods and services.

22 An example that illustrates USON's financial support is the cash flow it provides  
23 through its management of a Practice's account receivables. Each month USON

1 purchases accounts receivables generated by the Practice during the month by paying the  
2 Practice an amount equal to expected collections on those accounts, less USON's  
3 management fees and the amount of any expenses incurred by USON during the month in  
4 connection with its management services. You explain that the effect of this is that the  
5 Practice receives cash when the accounts receivables are accrued rather than when they  
6 are collected. Because the amount USON pays already reflects deductions for most  
7 operational expenses and USON's fees, the payment to the Practice is used primarily to  
8 pay its physicians. You state that if the Practice were not affiliated with USON, it would  
9 have to obtain this working capital financing from another source, such as a bank, or  
10 would have to wait to pay physicians and other salaries and expenses until the money  
11 from the account receivables are collected. You describe this as an important ongoing  
12 financial flow from USON to the Practices. The effect of this, you point out, is that  
13 USON provides the Practices with their cash flows.<sup>3</sup>

14 5. *Stock ownership*

15 You State that some physicians in the Practices own stock in USON but that this  
16 "is not a universal attribute of the physicians."

17 6. *Role in development*

18 You explain that USON's network development staff plays a significant role in  
19 Practice mergers and statewide Practice development. For example, where new entities  
20 or locations must be established, USON assists with tasks such as applying for provider

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<sup>3</sup> You explain that for regulatory reasons, governmental receivables are not purchased; instead, payment to the Practice is a loan secured by the receivable, but USON is responsible for the billing and collection functions and the economic effect is largely the same.

1 numbers, procuring and negotiating office space and undertaking similar formation-  
2 related tasks.

### 3 ***Question Presented***

4 *May USON solicit contributions to USON-GGC from its stockholders and their*  
5 *families and the medical executive and administrative personnel of the Practices*  
6 *managed by USON, including the physicians, nurses and other salaried medical staff who*  
7 *are employees possessing policymaking, managerial, professional, or supervisory*  
8 *responsibility, and their families?*

### 9 ***Legal Analysis and Conclusion***

10 Yes, USON may make the proposed solicitations. Under the affiliation factors in  
11 11 CFR 100.5 and 110.3, the Commission concludes that USON, through its subsidiaries,  
12 is affiliated with the Practices described in the request. Therefore, USON may solicit the  
13 Practices' restricted class which is comprised of the Practices' physicians, nurses and  
14 other salaried medical staff who are employees possessing policymaking, managerial,  
15 professional, or supervisory responsibility, and their families.

16 The Act permits a corporation or its separate segregated fund to solicit its  
17 stockholders and executive or administrative personnel, and their families for  
18 contributions to its SSF. 2 U.S.C. 441b(b)(4)(A)(i). A corporation or its separate  
19 segregated fund may also solicit the executive or administrative personnel of its  
20 subsidiaries, branches, divisions, and affiliates and their families. 11 CFR 114.5(g)(1).  
21 Section 114.5(g)(1) states that the factors set forth in 11 CFR 100.5(g)(4) shall be used to  
22 determine whether an organization is an affiliate of a corporation.

1           Section 100.5(g)(2) provides that affiliated committees include, *per se*, all of the  
2 committees established, financed, maintained or controlled by a corporation and/or its  
3 subsidiaries. USON does not own stock in any of the medical practices and therefore  
4 there is no parent/subsidiary relationship for purposes of the Act. Therefore USON and  
5 the Practices are not *per se* affiliated.

6           In the absence of certain automatically affiliated relationships such as a parent  
7 corporation and its subsidiary, Commission regulations provide for an examination of  
8 certain circumstantial factors in the context of the overall relationship to determine  
9 whether one organization is an affiliate of another. 11 CFR 100.5(g)(4). The list of ten  
10 factors set forth in 11 CFR 100.5(g)(4)(ii) is not an exhaustive list, and other factors may  
11 be considered.<sup>4</sup> *See, e.g.*, Advisory Opinion 2003-21. The relevant factors are discussed  
12 below.

13          Section 100.5(g)(4)(ii)(G) addresses whether a sponsoring organization or committee  
14 provides funds or goods in a significant amount or on an ongoing basis to another  
15 sponsoring organization or committee, such as through direct or indirect payments for  
16 administrative, fundraising, or other costs. USON provides significant administrative  
17 services such as billing, collection, and support staff necessary for the functioning of the  
18 Practice. As your request indicates, this also includes providing assistance and research  
19 for possible Practice expansion.

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<sup>4</sup> Several factors are not relevant to this request. Section 100.5(g)(4)(ii)(A) addresses whether a sponsoring organization of a committee owns a controlling interest in the voting stock or securities of the sponsoring organization of another committee. As noted above, USON does not have any ownership interest in a Practice, and stock ownership in USON is not a “universal” attribute of practice physicians. Section 100.5(g)(4)(ii)(D) is not applicable to this request because it refers to common or overlapping membership between two organizations and neither USON nor the Practices are membership organizations. Section 100.5(g)(4)(ii)(J) concerns similar patterns of contributions or contributors, and no Practice maintains its own SSF.

1           Section 100.5(g)(4)(ii)(H) addresses whether a sponsoring organization or  
2     committee causes or arranges for funds in a significant amount or on an ongoing basis to  
3     be provided to another sponsoring organization or committee. USON, through its  
4     Business Managers, provides the Practices with long-term financing on an ongoing basis.  
5     This financing allows the Practices to make significant capital expenditures such as  
6     purchasing medical equipment.

7           Section 100.5(g)(4)(ii)(B) addresses whether a sponsoring organization or  
8     committee has the authority or ability to direct or participate in the governance of another  
9     sponsoring organization or committee through provisions of constitutions, bylaws,  
10    contracts, or other rules, or through formal or informal practices or procedures. The facts  
11    in your request, including the MSA, indicate that USON, through its subsidiary, plays a  
12    substantial role in the financial governance of the Practices. The role of USON's  
13    Business Manager in a Practice's Policy Board is considerable even if it does not extend  
14    to the medical aspects of the Practice.

15          Your request describes the Business Manager's representatives' significant  
16    control over the non-medical matters before the Policy Board. A specific example from  
17    the MSA of how this control operates during the budget process further highlights this  
18    point. Under the MSA, the Business Manager prepares the budget to be used by the  
19    Practice. The MSA provides that "[t]he budget shall be adopted by the New LLC after  
20    reasonable review and comment and may be revised or modified only in consultation with  
21    the Business Manager." If the parties are not able to reach agreement on a new budget,  
22    the budget for the previous year is adopted for the current year. *See* MSA section 4.10.<sup>5</sup>

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<sup>5</sup> The Practice determines the amount of physician salaries once it receives its funds. *See* MSA section 2.4.

1 Thus, the Business Manager has considerable influence over the overall budget of the  
2 Practice.

3 The factors discussed in 11 CFR 100.5(g)(4)(ii)(C), (E) and (F) are interrelated  
4 and are addressed together. Section 100.5(g)(4)(ii)(C) addresses whether a sponsoring  
5 organization or committee has the authority or ability to hire, appoint, demote or  
6 otherwise control the officers, or other decision making employees or members of another  
7 sponsoring organization or committee. Section 100.5(g)(4)(ii)(E) addresses whether a  
8 sponsoring organization or committee has common or overlapping officers or employees  
9 with another sponsoring organization or committee which indicates a formal or ongoing  
10 relationship between the sponsoring organizations or committees. Section  
11 100.5(g)(4)(ii)(F) addresses whether a sponsoring organization or committee has any  
12 members, officers or employees who were members, officers or employees of another  
13 sponsoring organization or committee which indicates a formal or ongoing relationship  
14 between the sponsoring organizations or committees, or which indicates the creation of a  
15 successor entity.

16 These factors provide some support for an affiliation conclusion. Although there  
17 is no overlap of employees or personnel between USON and the Practice after the MSA is  
18 executed, many of the employees of the Practices are hired in the same capacity by the  
19 Business Manager. To the extent that former employees are retained by the Business  
20 Manager, this can be viewed as part of the ongoing relationship between USON and the  
21 Practice. The Practices also may exert influence over USON through the Practice

1 physicians that serve on USON's Board of Directors.<sup>6</sup> Further, the Practices and USON  
2 provide advice on each other's area of responsibility through the Policy Boards and the  
3 NPB.

4 Section 100.5(g)(4)(ii)(I) concerns whether a sponsoring organization or  
5 committee or its agent had an active or significant role in the formation of another  
6 sponsoring organization or committee. You state that USON may be involved in the  
7 expansion of current practices and the creation of new Practices. You also note that in  
8 many cases physicians who make up the Practices are required to reconstitute their  
9 professional organization as an LLC as a prerequisite to entering into the MSA with  
10 USON.

11 Considering all these factors together in context of the overall relationship  
12 between USON and the Practices, the Commission concludes that USON and the  
13 Practices are affiliated for purpose of the Act and Commission regulations.<sup>7</sup> You must  
14 inform the Practices that the Commission has concluded that USON is affiliated with the  
15 Practices under the Act.

16 You propose to solicit the Practices' physicians, nurses and other medical staff,  
17 and their families. Under 11 CFR 114.1(c), a corporation may solicit contributions to the  
18 SSF from the restricted class, which is comprised of executive or administrative

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<sup>6</sup> The importance of the current 20% representation is somewhat diminished by the fact that participation can vary. In a July 9, 2004 email, you confirmed that USON does not reserve board positions for practice members. However, USON supports Practice representation and since its inception the USON Board has had at least one such representative. The presence of practice members on the Board shows at least the possibility of Practice participation in the governance of USON.

<sup>7</sup> The Commission has stated in several advisory opinions that presence of the two factors in 11 CFR 100.5(g)(4)(i)(G) and (H) do not prevent a finding of disaffiliation. *See* Advisory Opinions 2003-21, 1996-42, 1996-23, 1995-36 and 1993-23. While these two factors are present in this situation, they exist in conjunction with several other factors which in the aggregate support a conclusion that USON and the Practices are affiliated.

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1 personnel of the corporation and the corporation's subsidiaries, branches, divisions, and  
2 affiliates and their families. Executive or administrative personnel include employees  
3 who are paid on a salary rather than hourly basis and who have policymaking, managerial,  
4 professional, or supervisory responsibilities. Section 114.1(c)(1)(ii) further states that  
5 executive or administrative personnel includes individuals following recognized  
6 professions, such as lawyers and engineers. Thus, the Commission concludes that  
7 USON may solicit the Practices' salaried physicians and nurses and their families for  
8 contributions to USON-GGC. USON may also solicit the other medical staff and their  
9 families provided that the medical staff are salaried employees who have policymaking,  
10 managerial, professional, or supervisory responsibility. However, the Practices' restricted  
11 class does not include professionals who are represented by a labor organization.<sup>8</sup> See 11  
12 CFR 114.1(c)(2)(i) and Advisory Opinion 1988-11.

13 This response constitutes an advisory opinion concerning the application of the  
14 Act and Commission regulations to the specific transaction or activity set forth in your  
15 request. See 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any  
16 of the facts or assumptions presented, and such facts or assumptions are material to a  
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<sup>8</sup> Other exclusions include salaried foreman, former or retired personnel who are not stockholders, and consultants who are not employees. Practice employees described in 11 CFR 114.1(c)(2) may not be solicited unless they fall within the class of individuals who may be solicited twice yearly under 11 CFR 114.6.

1 conclusion presented in this advisory opinion, then the requestor may not rely on that  
2 conclusion as support for its proposed activity.

3

4

Sincerely,

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6

7

Bradley A. Smith

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Chairman

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10 Enclosures (AOs 2003-21, 1996-42, 1996-23, 1995-36, 1993-23 and 1988-11)

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